UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Le-Jo Enterprises, Inc.	)	**Docket No. EPCRA -III-162**
	)	
Respondent	)	

ORDER DENYING ACCELERATED DECISION
and
ORDER SCHEDULING HEARING

The Region 3 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") commenced this proceeding by filing a Complaint dated May 16, 1995 against Le-Jo Enterprises, Inc., a corporation that owns and operates a manufacturing facility in Malvern, Pennsylvania (the "Respondent" or "Le-Jo"). The Complaint charges Respondent with two violations of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA") §313, 42 U.S.C. §11023. The charges allege Respondent failed to file two required "Form Rs" reporting its use of listed toxic chemicals in excess of the statutory threshold quantities, for the reporting years 1991 and 1993. The Complaint seeks a total civil penalty of $8861 for these two violations.

The Respondent initially filed an Answer by its President, Dominic D'Ambro, on June 16, 1995, in which he requested an informal settlement conference. On October 10, 1995, Complainant filed a Motion for Accelerated Decision on the liability of the Respondent for the alleged violations. The undersigned Administrative Law Judge ("ALJ") was designated the Presiding Officer in this proceeding on March 12, 1996. The ALJ then issued a Prehearing Order on March 28, 1996 establishing a schedule for filing of prehearing exchanges pursuant to the EPA Rules of Practice §22.19, and for Respondent to respond to Complainant's motion. On April 2, 1996, Respondent, by counsel, filed a second Answer to the Complaint, and an Answer to Complainant's Motion for Accelerated Decision. The parties also filed prehearing exchanges on May 24, 1996.

The EPA Rules of Practice, at 40 C.F.R. §22.20(a), empower the Presiding Officer to render an accelerated decision "without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding." Numerous decisions by the EPA Office of Administrative Law Judges and Environmental Appeals Board have noted that this procedure is analogous to the motion for

summary judgment under Section 56 of the Federal Rules of Civil Procedure. See, *e.g.*, In re CWM Chemical Serv., TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995).

The burden of showing there exists no genuine issue of material fact is on the party moving for summary judgment. Adickes v. Kress, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (10th Cir., 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits, and other evidentiary materials submitted in support or opposition to the motion. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); 40 C.F.R. §22.20(a); F.R.C.P. §56(c).

In this proceeding, the Respondent's Answer to Complainant's motion for accelerated is perfunctory in the extreme, consisting only of bare denials. However, the ALJ may consider the prehearing exchanges among the evidentiary materials submitted by the parties relevant to this motion. Respondent's prehearing exchange raises an issue of material fact with respect to whether Respondent "used" the threshold quantities of the two subject chemicals, Freon 113 ("Freon") and Trichloroethylene ("TCE"), to require the filing of Form R's for the two reporting years.

Specifically, Respondent proffers the testimony of its plant superintendent, Donald Welsh, and purchasing agent, Ben Forte. Respondent asserts they will testify that Le-Jo may have purchased more than 10,000 pounds of those chemicals in the subject years, but did not use that amount, as some was retained in inventory and not used during the reporting year.

Respondent is charged with two violations of EPCRA §313, 42 U.S.C. §11023(a), which requires submission of a Form R for listed toxic chemicals "manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the preceding calendar year at such facility." The threshold amount "[w]ith respect to a toxic chemical used at a facility" is 10,000 pounds per year. 42 U.S.C. §11023(f)(1)(A). The EPCRA regulations define "otherwise use" and "use" as follows:

> *Otherwise use* or *use* means any use of a toxic chemical that is not covered by the terms *manufacture* or *process* and includes use of a toxic chemical contained in a mixture or trade name product. Relabeling or redistributing a container of a toxic chemical where no repackaging of the toxic chemical occurs does not

constitute use or processing of the toxic chemical. 40 C.F.R. §372.3.

There is no dispute that Respondent's facility is subject to EPCRA reporting requirements, due to its Standard Industrial Classification and the number of its employees. However, on a motion for accelerated decision, construing the record most favorably to Respondent, it cannot be determined that Respondent "used" the threshold amounts of the two chemicals for the two reporting years, within the meaning of this regulatory definition.

Complainant's Affidavit of its inspector, Donald W. Stanton, states that he observed records during his inspection of the facility that "revealed that Respondent used approximately 15,000 pounds of Freon 113 in 1991 and approximately 11,800 pounds of TCE in 1993." (¶4, August 10, 1995). However, nowhere in Complainant's submissions with its motion or prehearing exchange are any such usage records presented. Complainant does produce purchase orders for the two chemicals, and the Form Rs submitted after the inspection (Complainant's prehearing exchange, Exs. 7-12). These exhibits do not indicate how much of the chemicals were actually used at the facility in any given year. Respondent has admitted it purchased 15,000 pounds of Freon 113 in 1991 and 11,880 pounds of TCE in 1993 (Respondent's prehearing exchange, only exhibit), but denied annual usage of those quantities.

Respondent's only exhibit submitted thus far with its prehearing exchange is itself an after-the-fact interoffice memorandum dated May 15, 1996. Thus, the actual usage records, if they exist, have not been submitted by either party. Respondent has indicated it intends to submit more specific documentary information on this issue before the deadline for filing supplemental exchanges, June 14, 1996. Such additional disclosure may or may not help clarify the matter. At this juncture, it appears that an evidentiary hearing will be necessary to determine exactly how Respondent purchased and "used" the subject chemicals, and to determine whether it used them in excess of the threshold amounts for the subject years. Since a material issue of fact remains unresolved, Complainant's motion for accelerated decision on liability is denied.

Respondent has also contested the amount of the proposed civil penalty, with regard to its lack of prior violations, lack of notice of the reporting requirement, and general lack of culpability. Thus, the issues of both liability and penalty amount remain for adjudication at this time, rendering it appropriate to schedule the hearing.

Order Scheduling Hearing

The hearing in this matter will begin at 9:30 A.M. on September 24, 1996, continuing if necessary on September 25, 1996,

in the western suburbs of Philadelphia, Pennsylvania, in the vicinity of Malvern, Pennsylvania, or in Philadelphia. The Regional Hearing Clerk, in consultation with Respondent, should first try to find a suitable hearing facility in the Malvern area. The parties will be advised of the exact location of the hearing and other hearing procedures when those arrangements are made.

Andrew S. Pearlstein
Administrative Law Judge

Dated: June 3, 1996
Washington, D.C.